

RELIGION, THE LAW, AND MEDICAL ETHICS

Commentary on Skene and Parker: the role of the church in developing the law

L Gormally

J Med Ethics 2002;28:224–227

Correspondence to:
Mr L Gormally, The Linacre
Centre for Healthcare
Ethics, 60 Grove End
Road, London NW8 9NH
UK; lukey@globalnet.co.uk

Revised version received
29 January 2002
Accepted for publication
14 February 2002

Skene and Parker are demonstrably mistaken in suggesting that the *amicus* role of Catholic bishops in three cases has been concerned with “developing” the law. In contrast with Skene and Parker’s free-standing conception of legal principle, the Catholic understanding of law’s rational moral foundations has permitted Catholic bishops to defend longstanding legal principle as well as defending the integrity of the church’s health care and welfare services. It is shown that in the three cases under discussion Catholic bishops were providing needed argument otherwise unavailable to the courts in defence of existing statute. In face of the attempts by pressure groups to bypass the legislature and use the courts to subvert fundamental legal principles, the church is perhaps uniquely capable of continuing to provide to the courts rational defences of those principles.

Professors Skene and Parker’s article, *The role of the church in developing the law*, refers to three cases in which Catholic bishops have made written submissions to Australian and English courts.¹ In none of these cases could the bishops be said to have been intent on “developing” the law. So the title of the article on which I have been invited to comment is something of a distraction. The real focus of Skene and Parker’s concern is the potential for doctrinal influence on judicial decisions, which they think episcopal interventions threaten, an influence they treat as axiomatically undesirable. The thought of church “doctrine” in *amicus* interventions touches a raw nerve in the authors. They are at a loss, however, to identify a convincing rational basis for this neuralgic discomfort. They do not seek to argue that there is no place in *amicus* interventions for church doctrine because it is demonstrably false, or because, its credibility depending on acceptance of the Church’s teaching authority, it could not belong to the realm of public discourse in a pluralistic society. Skene and Parker do not discuss their concern in terms of truth, falsity, or credibility. The assumptions and claims they make could not possibly serve to resolve the issue which inchoately engages them. Consider, for example:

- (1) their exposition suggests they think that “legal principles” have an authority independent of objective moral foundations;
- (2) they seem to think that principled opposition to policies the law may condone or accommodate—for example, abortion—is subjective in character (it is said to exhibit “subjective influences”);
- (3) in so far as they advert to a “background” to “legal principles” it seems to consist in merely a “social-moral compromise in the development of which” (it is claimed) “any putatively helpful doctrinal view has already been considered”.

If the law is “a distillation of a social-moral compromise” between conflicting subjective interests and preferences, and doctrine itself belongs to the realm of the subjective, it is not surprising that it proves impossible to distinguish the two. It remains noteworthy, nonetheless, that Skene and Parker are unable to show that there is any substance to their sustained display of anxiety.

The limits of a commentary will hardly admit of detailed discussion of the jurisprudential issues raised by the topic of Skene and Parker’s paper. In what follows I shall confine myself to:

- (1) stating briefly the outline of a more adequate account of the relationship between “doctrine” and “legal principle”, at the same time explaining in what sense church doctrine may be relevant to the interpretation of “legal principle”;
- (2) explaining the general considerations which may justify *amicus* interventions, and
- (3) outlining briefly the justifications for episcopal interventions in the three court cases referred to by Skene and Parker.

DOCTRINE AND LEGAL PRINCIPLE

People should not be fazed by the word “doctrine”; it simply means “teaching”. Skene and Parker seem to share the widespread mistaken belief that any proposition taught by the church is by that very fact “religious” and therefore not rationally grounded. But there are many propositions which the Catholic Church teaches—that God exists, that it is always wrong intentionally to kill the innocent, that lying is always wrong—the truth of which can be known without benefit of revelation.²

Some of the rationally defensible moral truths taught by the Catholic Church are foundational for the law. “Legal principles” are not free-standing. The law exists to serve a moral purpose—to help secure the common good. Indeed sound legislation constitutes an important part of that good, which is that ensemble of social and institutional arrangements required to facilitate the flourishing of all members of a community. Flourishing here means not the satisfaction of subjective preferences but a real sharing in fundamental human goods such as truth, friendship, justice, peace, and a right relationship to God. Human beings cannot frame their choices, and thereby shape their lives, by reference to the possibilities of sharing in such goods unless they enjoy certain basic rights and unless human activities are coordinated in ways conducive to human flourishing. Certain moral truths and the rights they entail—for example, the truth that it is always wrong intentionally to kill the innocent, which entails the right to life—translate directly in a sound legal system into laws³ (in the example cited, the law against murder, the scope of which is adequate only if the legal system is empirically accurate about who count as human beings). There are other needs for legal arrangements which admit of varied solutions, and laws framed for such purposes should be recognised as embodying an option for one solution rather than another. Nonetheless, the interpretation and application of such laws

cannot sensibly be thought of as proceeding quite independently of any consideration of their underlying purposes.

Against this background understanding of the foundations of law, it should be clear why reference to one or other part of a rationally defensible body of teaching (“doctrine”) about the foundations of the law is not to be excluded a priori from legal argument about the interpretation or application of laws.

THE CHURCH AND THE RATIONALE FOR AMICUS INTERVENTIONS

Skene and Parker refer to three cases in which representatives of the Catholic Church have been allowed to intervene in the courts, two Australian: *CES v Superclinics Australia Pty Ltd* (hereafter *Superclinics*) and *McBain v Victoria* (hereafter *McBain*) and one English: *Re A (children) (conjoined twins: surgical separation)* (hereafter *Conjoined twins*). The authors are mistaken in bracketing *amicus* interventions by the ProLife Alliance in the UK with interventions made on behalf of the Catholic church. The ProLife Alliance is a political party, with a particular concern for what should be a fundamental objective of public policy and the law: the protection of innocent human beings from conception until natural death.

All three interventions made on behalf of the Catholic Church can be justified in terms of considerations standardly invoked in allowing such interventions.⁴ In the three cases written submissions were filed. In the two Australian cases, the court allowed limited oral submissions.

Subsequently, the Australian Catholic Bishops Conference has applied to the High Court of Australia for review of the decision of the federal court (Sundberg J) in *McBain*. In those High Court proceedings (hereafter *Re Sundberg*), the Bishops Conference is the moving party; it is not an *amicus curiae* (the role on which Skene and Parker’s article focuses). The High Court heard argument over three days in September 2001. The court has reserved its decision in *Re Sundberg*. It seems reasonable to anticipate that the decision of the court in that case will have greater significance than *McBain*.

While Skene and Parker refer to the assistance which representation from non-parties to a civil action can provide to a court, they do not clearly identify the kinds of circumstance in which a court might deem that it needs to (or could) benefit from assistance which the representatives of the parties are not willing to provide. Judges rely heavily on the research and the assistance which counsel is able to provide. Courts face a particularly serious problem where parties are unwilling to argue something which is relevant to the case but is not in their interest. As we shall see, this was the case in both *Superclinics* and *McBain*. In *Conjoined twins* (Court of Appeal) the prior judgment in the High Court had significant defects which the Archbishop of Westminster’s written submission was in part intended to correct.

While one justification for non-party intervention is the benefit a court may derive from it, another is the substantial interest a non-party may have in the outcome. As we shall see, the Catholic church in Australia had important interests at stake in both *Superclinics* and *McBain*. Archbishop (now Cardinal) Murphy-O’Connor in his submission in *Conjoined twins* was not so much seeking to secure the interests of the Catholic community but basic interests of the whole society of which it is a part; when other bodies are unwilling or unable to defend the common good it is at least arguably desirable that the Catholic Church should do so.

THE CASES

Superclinics

In this case the plaintiff had sued for damages because doctors had failed to detect her pregnancy at a time when it was thought safe for her to obtain an abortion. The doctors defended themselves by arguing that she had lost nothing because, even if they had detected her pregnancy, it would

have been unlawful for them to proceed to abort her. In most Australian states (South Australia, and more recently Western Australia are exceptions) the law in respect of abortion is along the lines of the English *Offences Against the Person Act, 1861*. That law was weakened by rulings such as that in *Bourne* (1938) and further weakened by the *Menhennitt* ruling in the State of Victoria (named after the judge in *R v Davidson* 1969). The *Menhennitt* ruling relied on the doctrine of “necessity” and led the jury to acquit doctors accused of performing illegal abortions. Since there is no appeal from an acquittal, the ruling, which was erroneous in its reliance on the doctrine of necessity, was not subsequently considered by an appellate court. The *Menhennitt* ruling came to guide prosecutors and police, with the result that most Australian states have abortion on demand. A statute which provided that abortion was a criminal offence had in effect been set aside without any opportunity for parliament to consider the matter.

In *Superclinics*, the argument at trial and in the Court of Appeal in New South Wales related to (a) the liability of doctors for their negligent failure to diagnose a pregnancy in consequence of which a woman (b) “lost the opportunity” to have a “lawful” abortion. All parties proceeded on the basis that the *Menhennitt* ruling constituted the relevant law on abortion. No party to the proceedings put argument to the court that the legal basis for that ruling was at best problematic. The case went to the Australian High Court, to which the Australian Catholic Health Association and the Australian Catholic Bishops Conference jointly made a written submission. They had two reasons for doing so:

- (1) to present the High Court with a line of argument which would provide it with its first opportunity—after more than a quarter of a century—of reviewing the validity of the *Menhennitt* ruling. The doctors were unwilling to rest their case on an argument that the *Menhennitt* ruling was erroneous and that relevant longstanding provisions of the *Crimes Act* (NSW) prohibited them from carrying out the abortion on the plaintiff.
- (2) The Australian Catholic Health Association is an organisation which represents Catholic hospitals which are responsible for a significantly large part of health care provision in Australia. As the preamble to the submission states: “Their services are available to all women regardless of religious affiliation. These hospitals care for pregnant women. They diagnose pregnancy; they detect foetal abnormality. However, Catholic hospitals do not counsel terminations of pregnancy, do not carry out abortions, nor do they refer women to institutions where such terminations are carried out. To do so would violate the most basic beliefs of Catholics about human life, human dignity, and the equality of persons. If the law in Australia recognises the evidence of a cause of action arising out of the lost opportunity to provide an abortion, the law will imply the existence of a positive duty to advise every pregnant woman about the possibility of an abortion. Catholic hospitals may not be able to continue providing care of pregnant women.”

In its submission in *Superclinics*, the Australian Catholic Health Association and the Australian Catholic Bishops Conference sought both to present argument to the courts of a kind the court should have wished to hear but which the parties to the case were unwilling to provide, and to defend the integrity of Catholic health care provision for pregnant women. They were granted leave to intervene as *amicus curiae*. Soon after they were permitted to file their written submission the parties settled the case. It is a reasonable inference from their conduct that they saw the possibility that the *Menhennitt* ruling would be discredited. The *Menhennitt* ruling was based on the so-called doctrine of “necessity”, the existence and scope of which has always been highly controversial.⁵

McBain

In *McBain*, state legislation in Victoria restricted in vitro fertilisation (IVF) to married or *de facto* couples. The federal *Sex Discrimination Act* prohibits discrimination on the grounds of "... marital status". Dr McBain wanted to give IVF to a single woman. He argued that the state law was invalid because it was inconsistent with the federal law according to the operation of relevant provisions of the Australian constitution. In any such case, the Attorney-General for the State would standardly appear to defend the validity of the state legislation. A change in government led to the situation in which the state declared it was not prepared to make submissions. So the Australian Catholic Bishops Conference asked to be heard on the question whether the state law was inconsistent with the federal law. The judge permitted the bishops to make that submission because the state (and other Attorneys-General, Commonwealth and State, who had formal, statutory rights of intervention) had not done what the court would normally expect the state to do.

Here, then, as in *Superclinics*, the bishops were making a submission because of a serious lack of argument the court needed to hear: no one else was putting issues of law to the court pertaining to the rights of children. Moreover, it was also the case that the integrity of the church's extensive welfare services (such as those relating to adoption) were threatened by the outcome of *McBain*.

Conjoined twins

In this case, it will be recalled, doctors opposed parental refusal of consent to separate conjoined twins who were given the legal pseudonyms Jodie and Mary. Mary was certain to die as a result of separation and three of the four judges who considered the case interpreted this as a case of intentional killing. It was therefore not surprising that the twins' Catholic parents opposed the separation for the reason that "everyone has the right to life". In the High Court hearing of the case, Mr Justice Johnson held that separation surgery would be lawful. More particularly, he reasoned that the killing of Mary would be lawful, both because her early death would be in her best interests since her continued existence would be of negative value, and because the bringing about of her death (through the clamping of the shared aorta) should be understood as an omission (analogous to the omission of tube feeding) rather than a positive act. Mr Justice Johnson took *Bland* (1993) as the precedent for his judgment. There it had been held that continued existence was not in Tony Bland's best interests and that one could lawfully aim to end his life by a course of conduct classifiable as omission (withdrawal of tube feeding). Three of the five Law Lords had agreed that in so deciding the case they were reducing the law of homicide to an incoherent condition, holding as they did that it was lawful to aim at a patient's death by a course of conduct classifiable as omission but unlawful to do so by a positive act.

One major reason⁶ for the written submission⁷ to the Court of Appeal in *Conjoined twins* by the Archbishop of Westminster was to provide the court with argument (and it is *legal* argument, as in the other cases) on the radical unsoundness of *Bland* as precedent (see sections 14–18 of the submission); it was not to be anticipated that this argument would be otherwise available to the court. Another reason was to elucidate the grounds on which the parents' refusal of consent could be construed as "reasonable". Here, it is true, the position adopted in the Archbishop's submission came up against the framework of the *Children Act* of 1989 which requires the court in cases concerned with the welfare of children to reach an "independent and objective judgment" about what is in the "best interests" of children and, in the words of the Master of the Rolls, "give effect to its own judgment".⁸ That is to say, showing that a parental decision is "reasonable" will not ensure that it prevails. The fact that the argument in the

Archbishop's submission is on this matter at odds with the framework of English law does not reduce it to an irrelevant display of "doctrine". Though it could not be decisive for the court, it arguably served to highlight an undesirable restriction of parental rights in current English law. In its critique of the High Court judge's reliance on *Bland*, however, the submission may well be thought to have aided the court, as is suggested by the character of Lord Justice Ward's comprehensive rejection of Mr Justice Johnson's reasoning in respect of Mary.

CONCLUSION

It should be evident, then, from these brief analyses, that in each case the *amicus* role accorded to Catholic bishops has a standard justification. Though the granting of leave to intervene in this way is by way of exception to the rule that only the parties to litigation are permitted to be represented before the court, the granting of such leave is not at all "exceptional" in the sense of uncommon, as Skene and Parker seem to think.

It is ironic that they also seem to think that submissions by Catholic bishops, in insinuating Catholic "doctrine" into legal argument, threaten to influence the courts in "developing" the law in ways which circumvent the role of the legislature. They ask rhetorically: "Is the [Catholic] church not seeking to present a 'legislative interest' that should be presented to parliament—to change the law—rather than to the courts to influence their decisions?" The reality is that in all three cases the submissions of the bishops were in defence of existing statute law of long standing, and in *Superclinics* and *Conjoined twins* in circumstances in which the judiciary had unwarrantedly departed from law.

In his 1994 Upjohn Lecture, Professor (now Sir) Ian Kennedy argued, on (I would say) somewhat confused grounds,⁹ that voluntary euthanasia should be legalised. Despairing of realising this goal through parliamentary legislation, he urged the judiciary to "develop" the law in ways which would effectively accommodate euthanasia. Since then we have had the spectacle of cases supported by the Voluntary Euthanasia Society designed precisely to alter the law through judicial decisions. If Skene and Parker were seriously concerned about the legislative role of parliament in a democracy, they would do better to direct their attention not to Catholic bishops but to partisan academic lawyers, to the counsel who rely on their analyses of the law, and to the bodies who really do wish to circumvent the legislature.

In the Law Lords' hearing of the most recent case supported by the Voluntary Euthanasia Society, *R (Pretty) v Director of Public Prosecutions* (2001),¹⁰ in which counsel for Mrs Pretty were instructed by the pressure group Liberty, their Lordships gave leave to Archbishop Peter Smith, on behalf of the Conference of Bishops of England and Wales, to make a written submission to the court¹¹ (a submission the quality of which was subsequently praised by one of the senior law lords). The submission recalled that "it is ... a teaching of the Catholic faith that all the fundamental moral teachings of Christianity are truths accessible also to those who do not accept what we believe to be God's revelation, and even to those who do not accept the existence of God. So it is entirely in accordance with the expectations of Catholic theology that modern pluralist and secular societies such as ours recognise, and treat as fundamental truths, the *practically* equivalent moral, political, and legal principles and precepts." As the effort proceeds, through organisations such as the Voluntary Euthanasia Society and Liberty, to use both legislatures and courts to dismantle the law and the legal principles of many centuries of more or less Christian governance, perhaps only the Catholic Church can be expected to defend, with the requisite care and resolution, what can reasonably be defended. Courts, faced with "tactical" cases advanced by pressure groups, may continue to

value submissions from Catholic bishops as sources of argument in defence of fundamental legal principles.

ACKNOWLEDGEMENTS

I owe substantial debts in the writing of this article to Mr J G Santamaria QC, to Dr Warwick Neville, and to Professor John Finnis FBA. Mr Santamaria, of the Victorian Bar, appeared as counsel in the *Superclinics* litigation and in the *McBain* case. Dr Neville is Research Fellow of the Australian Catholic Bishops' Conference and had the carriage of both the *Superclinics* and *McBain/Sundberg* cases. I am also grateful to Dr John Keown and to my colleague Dr Helen Watt for their helpful comments on the penultimate draft of this commentary.

REFERENCES

- 1 **Skene L**, Parker M. The role of the church in developing the law. *Journal of Medical Ethics* 2002;**28**:217–20.
- 2 **Finnis JM**. The Catholic Church and public policy debates in Western liberal societies: the basis and limits of intellectual engagement. In: Gormally L, ed. *Issues for a Catholic bioethic*. London: The Linacre Centre, 1999: 261–73.
- 3 **George RP**. *In defense of natural law*. Oxford: Oxford University Press, 1999: 107–9.
- 4 **Neville W**. Abortion before the High Court—what next? Caveat intervenus: a note on *Superclinics Australia Pty Ltd v CES*. *Adelaide Law Review* 1998;**20**:183–92.
- 5 **See DPP for Northern Ireland v Lynch [1975]** AC 653 at 685 per Lord Simon; *R v Howe* [1987] 1 AC 417; *Morgentaler v The Queen* [1975] 53 DLR (3d) 161 at 209 per Dickson J; *R v Woolough* [1977] 2 NZLR 508. More recently, the Court of Appeal has discussed the doctrine; see *Re A (children) (conjoined twins: surgical separation)*. [2000] 4 All England Reports: 1007.
- 6 **See Gormally L**. The Maltese conjoined twins. *Second Opinion* 2001 Oct: 36–52, esp 41–5.
- 7 *Briefing* 2000;**30**:18–23. *Briefing*, the monthly publication of the Catholic Media Office, is brought out on behalf of the Conference of Bishops of England and Wales and the Conference of Bishops of Scotland, and contains mostly official statements and texts produced by bishops.
- 8 **Quoted in Re A (children) (conjoined twins: surgical separation)**. [2000] 4 All England Reports: 1007.
- 9 **Gormally L**. Walton, Davies and Boyd and the legalization of euthanasia. In: Keown J, ed. *Euthanasia examined: ethical, clinical and legal perspectives*. Cambridge: Cambridge University Press, 1995: 113–40, at 139–40.
- 10 **R (Pretty) v Director of Public Prosecutions** [2001] 3 *Weekly Law Reports* 1598, [2002] 1 *All England Law Reports* 1.
- 11 *Briefing* 2001;**12**:15–20; correction *Briefing* 2002;**1**:26.